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FTC Hearings Consider Pushing Boundaries of Merger Enforcement

Fourth and Fifth FTC Hearings on Competition and Consumer Protection consider more vigorous enforcement over vertical merger and innovation effects.

In the past two weeks, the Federal Trade Commission (FTC) held two more hearings in its series of nine planned Hearings on Competition and Consumer Protection in the 21st Century. In the fourth hearing, held on October 23 and 24, 2018, the FTC invited comment on the efficacy of the current intellectual property regime's (including the USPTO, the FTC, the PTAB, and federal courts) efforts to promote innovation, and the proper use of the FTC's enforcement and policy authorities in advancing innovation. The fifth hearing, held on November 1, 2018 reconsidered the conventional wisdom behind two long-standing principles of federal competition policy: the consumer welfare standard; and the starting point for merger analysis that vertical mergers, on the whole, create fewer competitive problems than horizontal ones.

Latham & Watkins is monitoring and sharing periodic insights on the FTC hearings, with a focus on significant statements from regulators, hints about where the FTC's enforcement priorities lie, and key points of disagreement among antitrust and consumer protection influencers. For prior analysis of the FTC hearings, please visit Latham's library of Thought Leadership.

Hearing #4 & #5's Big Idea: Rethinking Merger Enforcement

The hearings covered a wide range of topics — many of which have featured prominently in antitrust debates for decades. Among the discussions that may be most likely to impact antitrust enforcement in the near term were suggestions that merger enforcement should reach beyond price effects on consumers and horizontal mergers. More specifically, at least some among FTC leadership and staff indicated they will be looking more critically at mergers in three areas:

- Mergers that may negatively impact stakeholders beyond consumers (*e.g.* competitors, labor) even if consumers are expected to benefit
- Vertical mergers
- Mergers that may reduce or degrade innovation, even if there is no cognizable price effect

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Key Remarks

- "***Forty years into the experiment, we have to admit [the consumer welfare standard] has failed"*** Timothy Wu, Columbia University Law School

Panelists in Hearing #5 reconsidered a long-standing touchstone of antitrust enforcement: the consumer welfare standard. This standard essentially asks if the business conduct in question impacts prices or restricts output in a way that harms consumers. This question is the principle metric federal regulators use to determine whether to seek antitrust enforcement. While the consumer welfare standard has been at the core of antitrust enforcement for decades, recent critics argue that the standard leads to harmful concentration, and under-enforcement including in the area of merger enforcement.

Wu and other critics argued that regulators' myopic focus on efficiencies, particularly in merger enforcement analysis, has resulted in excessive market consolidation. He posited that the consumer welfare standard may be helpful to assess the costs of collusion, but is poorly suited to merger review. Maurice Stucke, from University of Tennessee College of Law, echoed this point by arguing that the significant decline in merger enforcement is a reason to replace the consumer welfare standard. Panelists like Jonathan Sallet of the Benton Foundation and the Open Markets Institute's Barry Lynn proposed a handful of alternatives, including using the standard as a guiding principal rather than the basis for bringing enforcement actions.

Other panelists defended the consumer welfare standard as predictable, administrable, and based in economics. Sharis Pozen, former Acting Assistant Attorney General for the DOJ Antitrust Division and current Vice President for Global Competition Law and Policy at GE, argued that consumers should remain at the center of the analysis and emphasized the importance of keeping economics as the backbone of competition law. She observed, "Some of the presentations today take us far away from that" and expressed concern that abandoning the consumer welfare standard to pursue other objectives, such as "fairness" would create an intolerable level of subjectivity and uncertainty for business, antitrust enforcers, and practitioners.

- ***"I think we really, very badly need new vertical merger guidelines."*** Professor Carl Shapiro, University of California at Berkeley

A long-standing starting point in federal merger enforcement is that vertical mergers are inherently "less likely than horizontal mergers to create competitive problems." The preceding quote is from the 1984 U.S. Department of Justice Merger Guidelines, which is the last time a federal regulator issued formal guidance on vertical mergers. At FTC Hearing #5 panelists variously described the 1984 guidelines as "badly out of date" and "a problem" for jurists and litigants. This followed an announcement just a few days prior by Makan Delrahim, Assistant Attorney General for the Antitrust Division for the DOJ that the agency hopes to issue revised guidelines for non-horizontal (*i.e.*, vertical and conglomerate) mergers in 2019 — an initiative that FTC Commissioner Christine Wilson pointed to in her closing remarks for Hearing #5.

Professor Steven Salop of the Georgetown University Law Center, a widely regarded thought leader on the topic, noted in his remarks that vertical mergers can create upward pricing pressure by eliminating indirect competition and may foreclose competitors' access to key inputs. Professor Salop argued that economists have developed a robust set of tools for analyzing the effects of vertical mergers, but the agency guidelines on vertical mergers do not adequately account for these advancements in economic thinking. According to Professor Salop: "[a]s we saw in *AT&T/Time Warner,* the courts are not very good at analyzing vertical mergers," which he attributed to outdated guidance and lack of enforcement

precedent. (In *AT&T/Time Warner*, the DOJ Antitrust Division failed to convince the district court of the division's view that the vertical deal would substantially lessen competition. The division's appeal is pending.)

A revision to the guidelines to account for the particular concerns expressed by Shapiro, Salop, and others could lead courts to become more receptive to such arguments in future litigated merger challenges. Whether the FTC Hearings spur the Commission to join the DOJ in revising the vertical merger guidelines remains uncertain, and is a point Latham & Watkins will follow in the months to come.

- ***"The FTC should [be] ready and willing to challenge a merger even when the facts show that the prevailing, and perhaps only, harm is to innovation."*** FTC Commissioner Rebecca Slaughter

Throughout FTC Hearing #4, panelists and presenters echoed a common theme: as the US economy evolves and becomes more reliant on intellectual property, the protection and promotion of innovation is a paramount goal for courts and federal regulators. While participants broadly agreed on the *ends* of intellectual property policy, they proffered different — and sometimes conflicting — visions for the *means* to achieve them. FTC Commissioner Rebecca Slaughter suggested that the FTC consider challenging mergers even if the loss of innovation is the only harm expected to arise from the deal. Currently, the FTC and DOJ consider the impact of a particular deal on the parties' incentives to innovate, but they have never blocked a deal solely on a harm-to-innovation theory. If the agencies follow Slaughter's suggestion, challenges to mergers could be brought even in the absence of cognizable price or quality effects. Even a deal in which the combination of two complementary technologies would result in a better product and/or lower prices could be at risk if the agencies are separately worried about a loss or degradation in innovation as such. At this point, what sort of standard would be applied in such a circumstance remains unclear.

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